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Of Activism and *Erie*— The Implication Doctrine's Implications for the Nature and Role of the Federal Courts

George D. Brown*

*As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating Erie R. Co. v. Tompkins . . . —Justice William O. Douglas.***

As every law student knows,¹ *Erie Railroad v. Tompkins*² is a very important case. The decision has spawned an enormous literature³—a fact noted by Judge Friendly twenty years ago⁴—and the “*Erie* doctrine” has been called “the central concern of an entire generation of academic lawyers.”⁵ Yet the Supreme Court has not decided a major “*Erie*” case since *Hanna v. Plumer*⁶ was handed down in 1965.⁷ Furthermore, the tide of academic writing has waned, at least for the moment.⁸

However, something is afoot with *Erie*. Citations to Justice Brandeis’ opinion in that case play a prominent role in recent decisions by the Supreme Court,⁹ as well as separate opinions by individual justices,¹⁰ in cases that have nothing to do with the *Erie* doctrine as the phrase is normally used. Justices Powell and Rehnquist, in particular, view *Erie* as powerful support for their view of the proper role of federal courts in the

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** *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

1. See, e.g., Younger, *What Happened in Erie*, 56 TEX. L. REV. 1011, 1011 (1978).

2. 304 U.S. 64 (1938).

3. See, e.g., C. WRIGHT, LAW OF FEDERAL COURTS § 55, at 352 n.1 (4th ed. 1983).

4. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 383 (1964).

5. Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980).

6. 380 U.S. 460 (1965).

7. See M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 180-81 n.98 (1980).

8. The debate triggered by Westen and Lehman, see *supra* note 5, appears to be the last major flurry. See Redish, *Continuing the Erie Debate: A Response to Westen and Lehman*, 78 MICH. L. REV. 959 (1980); Westen, *After “Life for Erie”—A Reply*, 78 MICH. L. REV. 971 (1980).

9. E.g., *Parratt v. Taylor*, 451 U.S. 527, 531 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981).

10. E.g., *Carlson v. Green*, 446 U.S. 14, 37-38 (1980) (Rehnquist, J., dissenting); *Cannon v. University of Chicago*, 441 U.S. 677, 742 (1979) (Powell, J., dissenting).

context of what might be called nonconstitutional litigation.¹¹ Not surprisingly, given the views expressed by these two justices in other contexts,¹² that role is viewed as a highly limited one.

This Article traces the development of the Powell-Rehnquist new *Erie* doctrine, beginning with an analysis of its antecedents in *Erie*.¹³ Second, the Article examines the doctrine at work—notably, in the area of implied rights of action under federal statutes,¹⁴ in which Justice Powell has brought about a startling reversal of the law—and will consider where it might strike next.¹⁵ Third, the Article will consider the validity of the *Erie*-based, Powell-Rehnquist vision of the role of the federal judiciary.¹⁶ Despite the barrage of scholarly criticism leveled at Justice Powell's approach to the issue of implied rights, it is contended in this Article that his highly restrictive approach is correct. The Article concludes by examining the contrast between the new *Erie* doctrine's view of a limited common-law role for the federal courts and the cutting edge of academic thinking that advocates a broad common-law role for all courts in order to preserve the legal system.¹⁷ The Article rejects any such vision of the judicial process, at least in the context of the federal courts. It is argued that the Powell-Rehnquist retreat from judicial activism serves important institutional values, especially the primacy of Congress as the policy-making branch of the national government.

I. A NEW *ERIE* DOCTRINE?

A. *Erie—Decision and Doctrine*

In *Erie* the Supreme Court faced a straightforward question: can federal tribunals exercising diversity jurisdiction formulate principles of general substantive law governing such areas as torts and contracts, which are independent of and different from state law concerning the matter? The Court gave a straightforward answer: no, because of a revised interpretation of the Rules of Decision Act's¹⁸ reference to "the laws of the several states," because of considerations of fairness to litigants, and because of constitutional limitations on the power of the national government to

11. Whether or not *Bivens*-type damage remedies for violations by federal officials of constitutional rights present issues of "true" constitutional law or a form of subconstitutional common law is discussed in *infra* text accompanying notes 251-57.

12. *E.g.*, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982) (Rehnquist, J.) (denial of standing); *United States v. Richardson*, 418 U.S. 166, 184-85 (1974) (Powell, J., concurring) (denial of standing).

13. *See infra* text accompanying notes 18-108.

14. *See infra* text accompanying notes 109-99.

15. *See infra* text accompanying notes 200-61.

16. *See infra* text accompanying notes 262-302.

17. *See infra* text accompanying notes 303-29.

18. 28 U.S.C. § 1652 (1976).

make law in such areas. Yet the *Erie* doctrine—generally defined as something like “the principle for determining the relationship between state law and federal law in the federal courts”¹⁹—is generally described as an area of great confusion.²⁰

Part of the confusion arises because the typical *Erie* case does not deal at all with any effort by the federal courts to make general substantive law, but with potential conflict between state policies and federal court procedures.²¹ A decade ago, Professor John Hart Ely removed much of the confusion by distinguishing among constitutional limits on congressional power, statutory limits contained in the Rules of Decision Act, and statutory limits contained in the Rules Enabling Act.²²

In the post-Ely era there is general agreement that most *Erie* problems are, in Ely's words, rather “ordinary.”²³ The principal subject of scholarly concern appears to be the bearing of the Rules of Decision Act (and any light that *Erie* sheds on it) on potential federal-state procedural conflicts when there is no specifically controlling federal statute or rule.²⁴ This subject certainly raises important and interesting questions such as the propriety of a balancing test and the appropriate factors to be balanced.²⁵ Still, it is hard to see how any such inquiry could engender a fundamental reassessment of the role of the federal judiciary. To understand *Erie*'s place in this reassessment it is necessary to consider the decision's constitutional underpinnings.

B. *Erie and the Constitution*

One need read no further than the first sentence of *Erie*²⁶ to sense that something fundamental is in question. Yet, the constitutional bases for overruling *Swift v. Tyson*²⁷ have been the subject of much discussion and debate, particularly in the years immediately following the decision.²⁸ Justice Brandeis' choice of this rubric has seemed questionable since so

19. Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980).

20. E.g., M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 169 (1980).

21. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 467 (1965).

22. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 698 (1974).

23. *Id.*

24. Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 315 (1980).

25. See, e.g., M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 172-73 (1980).

26. “The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.” 304 U.S. at 69 (footnote omitted).

27. 41 U.S. (16 Pet.) 1 (1842).

28. E.g., C. WRIGHT, *LAW OF FEDERAL COURTS* § 56, at 359-60 (4th ed. 1983); Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384-86 (1964).

many nonconstitutional grounds for the result were available, and, indeed, present in the opinion itself.²⁹ More recent analyses, however, tend to agree with Judge Friendly that the Court "not only reached the right result but reached it for the only right reason."³⁰

The rule of *Swift* was unconstitutional because it thrust the national government into an area not assigned to it—the making of general law.³¹ The Constitution sets up a national government of limited powers—essentially those enumerated in article I. The tenth amendment³² confirms this understanding, and Brandeis reaffirmed it when he declared that under *Swift* the federal courts had "invaded rights which in our opinion are reserved by the Constitution to the several States."³³

Viewed in this light, the constitutional portion of *Erie* is solidly grounded in first principles of the American federal system. Alternative constitutional rationales for the decision may be advanced—building on language in the opinion that suggests considerations of equal protection³⁴ or due process.³⁵ The latter has received the most attention from commentators³⁶ and judges³⁷ who have focused on the difficulties of planning "primary conduct" when its litigational consequences may vary depending on the forum in which any suit is brought.

Such constitutional analyses help further an understanding of *Erie*. They tell us nothing, however, about the particular nature and role of the federal courts, as distinct from other branches of the national government.³⁸ To garner insight on this issue we must examine the extent to which separation of powers considerations may be lurking within *Erie*. Such considerations are obviously present in a superficial sense since Brandeis tells us that the federal courts had been flouting the will of Congress expressed in the Judiciary Act of 1789.³⁹ On a slightly less superficial level it might be argued that *Erie*'s root and branch rejection of *Swift* carries with it a denial of Justice Story's assertion that federal and state

29. Constitutional arguments do not appear until the "third" part of the opinion. 304 U.S. at 78. The first and second parts justify overruling *Swift* on grounds of statutory interpretation and policies of equitable administration of the laws. *Id.* at 71, 74.

30. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384 (1964).

31. See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 702-03 (1974).

32. U.S. CONST. amend. X.

33. 304 U.S. at 80.

34. *Id.* at 75. But see Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 713 (1974) (*Erie*'s allusion to an equal protection basis is only metaphorical).

35. See 304 U.S. at 74 n.8.

36. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 697-98 (2d ed. 1973).

37. See, e.g., *Hanna v. Plumer*, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring).

38. See, e.g., Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1682 (1974).

39. 304 U.S. at 72-73.

tribunals perform "like" functions⁴⁰ in the judicial system. Guidance on the point ought to be found in the constitutional portion of *Erie*. A strong negative inference concerning federal judicial power might be drawn from Brandeis' statement that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."⁴¹ These words, followed shortly by the aphorism that "[t]here is no federal general common law,"⁴² might be taken as denying to the federal courts any law-making power. The core of Brandeis' tenth amendment analysis rests, however, on the notion of an "invasion" of powers reserved to the states, and treats Congress and the courts as equally culpable if they commit such an act.⁴³

In a significant refinement of *Erie*, Professor Paul Mishkin argues that separation of powers considerations are actually fundamental to understanding the decision and its prominent place in the American judicial pantheon.⁴⁴ Like Ely, Mishkin begins with the notion of a national government of limited powers vis-à-vis the states. In the valid exercise of those powers, however, the national government will, under the supremacy clause,⁴⁵ displace state law. For Mishkin, there is a significant difference between Congress effectuating this displacement and such an action on the part of the federal courts.⁴⁶ The states are represented in Congress and thus participate in displacement decisions that alter the balance of power within the federal system.⁴⁷ The states enjoy no such representation in the federal courts. Indeed, the Framers left to Congress the choice of whether to create federal courts at all and granted Congress broad power over federal courts' jurisdiction.⁴⁸ Given this structure, it would be "almost ludicrous" to attribute to Congress' creatures an "equally wide range in the displacement of state social policy or substantive law."⁴⁹

Mishkin's federalism-based separation of powers analysis certainly reinforces the central thrust of *Erie*. It has influential adherents within the Court⁵⁰ and among commentators.⁵¹ Separation of powers analysis plays an important role in analyzing the problems discussed in this Arti-

40. *Swift*, 41 U.S. (16 Pet.) at 19.

41. 304 U.S. at 78 (emphasis added).

42. *Id.*

43. See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 703 & n.62 (1974).

44. See Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1685-87 (1974).

45. U.S. CONST. art. VI, cl. 2.

46. Mishkin, *Some Further Last Words on Erie—The Thread*, 87 HARV. L. REV. 1682, 1683 (1974).

47. *Id.* at 1685.

48. *Id.* at 1684 n.10.

49. *Id.*

50. E.g., *Miree v. DeKalb County*, 433 U.S. 25, 31-32 (1977).

51. E.g., P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 767 (2d ed. 1973).

cle and the general question of the nonconstitutional role of the federal courts.⁵²

Several preliminary caveats are in order. First, Mishkin's analysis is a substantial extrapolation from what Brandeis said (and held) in the constitutional portion of *Erie*. The powers of the national government are at issue, not any distinction between the branches.⁵³ Second, it is far from clear that Professor Herbert Wechsler's thesis concerning the "political safeguards of federalism"⁵⁴—an important conceptual underpinning of the separation of powers analysis—is as valid as when proffered thirty years ago. Professor Lewis Kaden has argued persuasively that members of Congress regard themselves as national legislators acting to further the national interest, rather than as guardians of state prerogatives against incursion by Washington.⁵⁵ Under current conditions, the Supreme Court may be the best candidate for the latter role.⁵⁶ Perhaps the most serious obstacle facing the separation of powers analysis of *Erie* is the tenacious persistence of various forms of "federal common law."

C. *Erie and the Federal Common Law*

In combing the lore of *Erie* one frequently finds statements such as the following: "Since *Erie R.R. v. Tompkins* . . . federal courts have not enjoyed any general authority to make common law."⁵⁷ The impression conveyed is that an almost pauline transformation of article III took place on April 25, 1938. Yet one finds with equal frequency statements to the effect that "[i]t is unclear . . . under exactly what circumstances the federal judiciary will, in the absence of a directly applicable federal statute, choose to employ federal common law. At no time has the Supreme Court definitively explained either the principles which determine when courts should resort to federal common law or the specific categories of situations to which federal common law will apply."⁵⁸

Part of the confusion may stem from the fact that *Erie* simply did not deal with the question of when federal courts *can* fashion common law. The Constitution furnishes no sure answer. It might be thought that article I resolves any and all issues of law-making competence. Section one thereof provides that "[a]ll legislative powers [therein] granted shall

52. See *infra* text accompanying notes 282-302.

53. See *supra* text accompanying notes 31-33.

54. See generally Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

55. See Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 865 (1979).

56. Cf. *National League of Cities v. Usery*, 426 U.S. 833, 839-40 (1976).

57. Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1224 (1982).

58. M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 79 (1980); accord Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1084 (1964).

be vested in a Congress of the United States.”⁵⁹ Furthermore, the powers listed in article I, section eight, are generally regarded as the enumerated powers of the national government. Article III, however, provides that any federal courts which are established⁶⁰ shall exercise the “judicial power.”⁶¹ It seems reasonable to assume that the Framers had in mind those courts with which they were familiar, notably Anglo-American common-law courts.⁶²

Faced with this uncertainty, some have bitten the bullet and argued that the federal courts are similar to, if not identical with, true common-law courts, as long as they act within the overall authority of the national government. Perhaps the best known support for this position is Justice Jackson’s concurring opinion in *D’Oench, Duhme & Co. v. FDIC*.⁶³ According to Jackson,

[t]he federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.⁶⁴

Jackson’s view is quite consistent with Professor Ely’s reading of *Erie*⁶⁵ and has been echoed by other members of the Court.⁶⁶ It is not without scholarly adherents, notably the recent extensive reexamination of *Erie* by Professor Peter Westen and Jeffrey Lehman.⁶⁷ Westen and Lehman stress the essential similarity between statutory interpretation and fashioning common law; each judicial function involves the assessment of public policy as the legislature has or would have declared it.⁶⁸ Thus, they proffer the following maxims of federalism:

Federal Common Law: The federal courts make nonconstitutional law both by interpreting statutes and by declaring common law; statutory interpretation

59. U.S. CONST. art. I, § 1 (emphasis added).

60. Under article III a Supreme Court “shall” be established. Congress retains discretion whether or not to “constitute tribunals inferior to the supreme court.” *Id.* § 8.

61. *Id.* art. III.

62. See Note, *The Federal Common Law*, 82 HARV. L. REV. 1512, 1515-16 (1969).

63. 315 U.S. 447 (1942).

64. *Id.* at 469 (Jackson, J., concurring) (emphasis original).

65. See *supra* text accompanying notes 31-33.

66. E.g., *Montana—Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting).

67. Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311 (1980).

68. E.g., *id.* at 331-33.

*and common law adjudication differ from one another only in degree; in each case the courts speak for—and are subordinate to—the final authority of the legislature.*⁶⁹

*The Validity of Federal Common Law: Federal common law is measured by the same standard of validity as federal statutory interpretation; the measure in each case is whether the law declared by the courts is consistent with prevailing legislative policy.*⁷⁰

Despite the forcefulness with which this view has been advanced, Professor Redish is unquestionably correct in stating that “the Court and most commentators seem to agree that the role of federal common law is a relatively limited one.”⁷¹ *Erie* is generally cited as the source of such a limitation.⁷² After all, Brandeis said unequivocally that “there is no federal general common law.”⁷³ One might draw from the federalism underpinnings of *Erie*, or from the separation of powers analysis advanced by Professor Mishkin, a general “presumption” in favor of state law.⁷⁴

Still, proponents of the limited view are forced to grapple with the problem of when federal courts *can* create common law, a matter on which *Erie* is not much help.⁷⁵ One approach has been to identify “zones” or “areas” in which the federal courts have created common law without arousing substantial opposition, such as interstate disputes, maritime law, matters of federal proprietary interests, and international law.⁷⁶ One frequently cited commentary⁷⁷ advocates as criteria the presence of “matters to which the concept of national sovereignty dictates a nationwide solution,” the exercise by Congress of its power to delegate “lawmaking authority,” and the need for courts to perform “the traditional judicial function of formulating remedies.”⁷⁸

As Professor Mishkin points out, “effective Constitutionalism” requires that the federal courts possess some quantum of law-making power.⁷⁹ The phrase serves both as a justification and a limitation. It is helpful as a starting point, but gives no clear guidance as to when to stop. Once concepts such as “national interest”⁸⁰ creep in, federal common law can

69. *Id.* at 331.

70. *Id.* at 336; *see id.* at 338-39.

71. M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 80 (1980) (footnotes omitted).

72. *E.g.*, Stewart & Sunstein, *supra* note 57, at 1224.

73. 304 U.S. at 78.

74. *See, e.g.*, Note, *supra* note 62, at 1517-19.

75. The fact that *Erie* proscribes “general” federal common law may suggest a limiting concept of “special.” However, federal law itself is special, given its interstitial character.

76. Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1025 (1967); *see* M. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 85-107 (1980).

77. Note, *supra* note 62.

78. *Id.* at 1519-20.

79. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957).

80. *See* Note, *supra* note 62, at 1517.

quickly spread to areas that would make Brandeis shudder.⁸¹ For present purposes perhaps what is important is that federal common law is limited, and that this is the case because, somehow, *Erie* tells us so. In any event, the notion of a restricted field of federal common law is an important building block on which a "new *Erie* doctrine" rests.

D. The New *Erie* Doctrine

For the last decade the Supreme Court has been divided sharply over the extent to which federal courts possess common-law powers. This division reflects deeper, fundamental differences concerning the nature and role of the federal judiciary. A substantial block of the Court—probably four Justices—views the common-law powers of federal courts as extremely limited and stresses the primacy of Congress in all matters of "lawmaking."⁸² This judicial perspective is referred to as the "new *Erie* doctrine" for several reasons. *Erie* serves as a precedential touchstone for the proposition that federal courts, unlike their state counterparts, are not true common-law courts. More importantly, its extraordinary moral capital⁸³ serves to legitimize a highly controversial view of the nature and role of the federal courts. As for "new," this perspective may not constitute an abrupt rupture with prior law, but it surely is different in reading into *Erie* far more stringent limitations on the nature and role of the federal courts than generally had been found there before.

A good way to make this particular point is to consider the 1971 case of *Bivens v. Six Unknown Federal Narcotics Agents*.⁸⁴ At issue was the availability of a damages remedy, implied directly from the Constitution, to compensate alleged violations of the fourth amendment by federal officials. The majority, per Justice Brennan, answered the question in the affirmative, reasoning that a federal norm was involved and that a federal court should perform its traditional function of fashioning an appropriate remedy.⁸⁵ Three justices dissented on separation of powers grounds, terming the Court's opinion "an exercise of power that the Constitution does not give us"⁸⁶ and "judicial legislation."⁸⁷

The only member of the Court to cite *Erie* was Justice Harlan, who

81. See, e.g., *Kohr v. Allegheny Airlines*, 504 F.2d 400, 404 (7th Cir. 1974) (national interest in airways regulation justifies formulation of federal common-law rule of contribution and indemnification in aviation collision case involving private parties), *cert. denied*, 421 U.S. 978 (1975).

82. Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor share this view. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 395 (1982) (Powell, J., dissenting).

83. See B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 272 n.4 (1977), quoted in Westen & Lehman, *Is There Life for Erie After the Death of Diversity?*, 78 MICH. L. REV. 311, 312 (1980).

84. 403 U.S. 388 (1971).

85. *Id.* at 395-97.

86. *Id.* at 428 (Black, J., dissenting).

87. *Id.* at 430 (Blackmun, J., dissenting).

concurring in the judgment.⁸⁸ *Erie* was cited in the context of the mundane observation that federal question jurisdiction "depends on the presence of a substantive right derived from federal law."⁸⁹ Presumably Harlan was referring to the sorts of nonstatutory law that federal courts could validly fashion after *Erie*. He analyzed the fundamental issue as that of "judicial power to grant . . . damages,"⁹⁰ and reasoned that "the range of policy considerations [the Supreme Court] may take into account is at least as broad as those a legislature would consider with respect to an express statutory authorization of a traditional remedy."⁹¹

Harlan's opinion is a veritable ode to the federal common law: "[A] court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies."⁹² Its significance for present purposes is twofold. First, Harlan certainly took *Erie* seriously.⁹³ Yet, writing in 1971 he saw no inconsistency between *Erie* and an expansive view of federal common law. Second, Harlan's analysis was not limited to the implication of particular remedies from the Constitution. He also expressed approval of the then-prevailing liberal standards concerning implication of damages remedies from federal statutes, as exemplified by *J.I. Case Co. v. Borak*.⁹⁴ Harlan could not have been more explicit in his common-law characterization of "[t]he exercise of judicial power involved in *Borak*."⁹⁵

The new *Erie* doctrine appears most clearly in three recent opinions by Justices Powell and Rehnquist, discussed more extensively below,⁹⁶ which express a vision of the federal judicial function far different from that articulated by Justice Harlan in *Bivens*. In the 1979 case of *Cannon v. University of Chicago*⁹⁷ Justice Powell argued in a dissenting opinion that since the federal courts possess no general common-law powers, implication of a private right of action under a federal statute a la *Borak* was a violation of the constitutional doctrine of separation of powers.⁹⁸ A year later, dissenting in *Carlson v. Green*,⁹⁹ Justice Rehnquist urged that *Bivens* be overruled.¹⁰⁰ He relied on *Erie* and its rejection of the notion "that federal courts may declare rules of general common law in civil fields"¹⁰¹ as direct support for the proposition that implication of damages remedies from the Constitution is a form of forbidden judicial law making.

88. *Id.* at 400 (Harlan, J., concurring).

89. *Id.* (Harlan, J., concurring).

90. *Id.* at 401 (Harlan, J., concurring) (emphasis original).

91. *Id.* at 407 (Harlan, J., concurring).

92. *Id.* at 408 n.8 (Harlan, J., concurring).

93. See *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

94. 377 U.S. 426, 433 (1964).

95. *Bivens*, 403 U.S. at 402-03 n.4 (Harlan, J., concurring).

96. See *infra* text accompanying notes 137-41, 201-11, 233-41.

97. 441 U.S. 677 (1979).

98. *Id.* at 730 (Powell, J., dissenting).

99. 446 U.S. 14 (1980).

100. *Id.* at 32 (Rehnquist, J., dissenting).

101. *Id.* at 38 (Rehnquist, J., dissenting).

In 1981 Justice Rehnquist wrote the majority opinion in *City of Milwaukee v. Illinois*.¹⁰² At issue was the ability of federal courts to create federal common law in an area that Congress had "addressed" via a comprehensive statutory scheme. Again, *Erie*'s denial of a general federal common-law power was decisive.¹⁰³ Justice Rehnquist relegated federal common law to the status of a "'necessary expedient'"¹⁰⁴ whose necessity disappears once Congress has spoken. Taken together, these three opinions envisage federal courts virtually bereft of law-making authority. The new *Erie* doctrine rejects any notion of the federal courts playing a concurrent and complementary law-making function vis-à-vis the legislative branch.

Whether *Erie* itself stretches this far is debatable. The spirit of *Erie*, however, suggests that the distinction between federal courts and state courts of general jurisdiction is fundamental. Questions of legitimacy are certainly one source of the Powell-Rehnquist position. Under what Professors Stewart and Sunstein call the "formalist thesis," sovereign commands can only emanate from the elected representatives of the sovereign people.¹⁰⁵ In formulating their theory of separation of powers, Powell and Rehnquist tend to emphasize two slightly different themes: the impact of court decisions on individuals who cannot participate in the litigation process, but who have, by hypothesis, participated in the legislative process¹⁰⁶; and the superior competence of legislative bodies to make the type of decisions in question.¹⁰⁷ In the formulation of the separation of powers doctrine, considerations of federalism along the lines suggested by Professor Mishkin do play a role,¹⁰⁸ but it is a subordinate one. What Powell and Rehnquist are saying about the nature and role of the federal courts is crucial, and transcends the context of any particular case or group of cases. Before evaluating their view, however, it is necessary to examine the new *Erie* doctrine at work and the scholarly response to it.

II. *ERIE* AND IMPLICATION—THE SAGA OF *CORT V. ASH*

A. *Implication as a Form of Federal Common Law*

The Court's recent decisions concerning whether to imply a private right of action from a federal statute¹⁰⁹ have received extensive scholarly

102. 451 U.S. 304 (1981).

103. *Id.* at 312-13.

104. *Id.* at 314 (quoting Committee for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976) (en banc)).

105. Stewart & Sunstein, *supra* note 57, at 1221-23.

106. See Cannon v. University of Chicago, 441 U.S. 677, 731, 743 (1979) (Powell, J., dissenting).

107. See City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981); Carlson v. Green, 446 U.S. 14, 48 (1980) (Rehnquist, J., dissenting).

108. See City of Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981).

109. E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979); Cannon v. University of Chicago, 441 U.S. 677 (1979); Cort v. Ash, 422 U.S. 66 (1975).

attention,¹¹⁰ and deservedly so. The implication issue is important and recurring, and it has produced surprisingly deep divisions within the Court.¹¹¹ For purposes of this Article, it is the area in which the new *Erie* doctrine can most clearly be seen at work. Even so, it is important to consider at the outset whether implication cases are sui generis or whether they are part and parcel of the federal common law.

Recently the Court has insisted that whether to imply a right of action under a federal statute or to grant plaintiff relief under federal common-law principles are two separate and distinct inquiries.¹¹² This is certainly a departure from prior practice. Although most implication opinions did not focus on the matter, the Court certainly acted as if it were engaging in a common-law form of analysis, even citing the *Restatement of Torts* to explain its decisions.¹¹³ Also, most commentators viewed the implied rights cases as paradigmatic examples of federal common law.¹¹⁴

Implying rights of action has sturdy common-law roots in the statutory-tort doctrine.¹¹⁵ Alternatively, it can be viewed as performance of the traditional judicial function of fashioning remedies for violations of primary law.¹¹⁶ Of course, no federal statute provides a precise answer to the remedial issue. Rather, the court resolves it in accordance with the social policies underlying the relevant statute, which certainly sounds like federal common law as defined by Justice Jackson.¹¹⁷

Not only does it make sense to view implication analysis and federal-common-law analysis as one question; treating them as two can lead to anomalies. As discussed below,¹¹⁸ the current Court presents implication as a matter of discerning legislative intent. Yet if Congress intended private

110. See, e.g., Creswell, *The Separation of Powers Implications of Implied Rights of Action*, 34 MERCER L. REV. 973 (1983); Frankel, *Implied Rights of Action*, 67 VA. L. REV. 553 (1981); Greene, *Judicial Implication of Remedies for Federal Statutory Violations: The Separation of Powers Concerns*, 53 TEMP. L.Q. 469 (1980); Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333 (1980); Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1 (1978); Steinberg, *Implied Private Rights of Action Under Federal Law*, 55 NOTRE DAME LAW. 33 (1979); Stewart & Sunstein, *supra* note 57; Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371 (1976); Note, *Implied Private Right of Action Under the Commodity Exchange Act: Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 36 SW. L.J. 1055 (1982).

111. Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 355 (1982) (Stevens, J.) with *id.* at 395 (Powell, J., dissenting); compare *Cannon v. University of Chicago*, 441 U.S. 677, 680 (1979) (Stevens, J.) with *id.* at 730 (Powell, J., dissenting).

112. See *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981); *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 90 (1981).

113. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 202 (1967).

114. Note, *supra* note 62, at 1523-25.

115. See Creswell, *supra* note 110, at 973.

116. Note, *supra* note 62, at 1523-25.

117. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

118. See *infra* text accompanying notes 184-85.

enforcement, that ends the inquiry. On the other hand, if Congress did not intend private enforcement, it is hard to see how common-law analysis would permit a court to go beyond the legislative desire. Of course, in most cases Congress did not foresee the problem. The real question then becomes whether a federal court can apply common-law analysis to the case before it or must treat congressional silence as a preclusion, absent something like "compelling evidence"¹¹⁹ to the contrary.

B. Implication Doctrine—From Borak to Cort to Chaos

The bizarre history of the implication doctrine over the last decade, although a tale frequently told,¹²⁰ merits a brief summary. Prior to the 1970's, implication was hardly a burning issue for the Supreme Court. The few decided cases presented neither a definite pattern,¹²¹ nor any elaboration of a coherent doctrine. It is true that the decision in *J.I. Case Co. v. Borak*¹²² manifested a receptive attitude which led to a flowering of implication cases.¹²³ Still, *Borak* was not seriously questioned, quite the contrary,¹²⁴ and was cited approvingly by a unanimous Court in *Cort v. Ash*.¹²⁵

The plot begins to thicken with the *Cort* decision and its elaboration of a "four factor" approach to analyzing implication issues.¹²⁶ *Cort* has been seen by commentators,¹²⁷ and by some members of the Court itself,¹²⁸ as the elaboration of a substantially more restrictive approach (presumably more restrictive than *Borak*). It is impossible to discern any such funda-

119. *Cannon v. University of Chicago*, 441 U.S. 677, 731 (1979) (Powell, J., dissenting).

120. See *supra* note 110.

121. See Creswell, *supra* note 110, at 976-77.

122. 377 U.S. 426 (1964).

123. Creswell, *supra* note 110, at 980.

124. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402 (1971) (Harlan, J., concurring); Note, *supra* note 62, at 1521.

125. 422 U.S. 66, 78 (1975).

126. In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted" . . . —that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (emphasis original) (citations omitted).

127. *E.g.*, Frankel, *supra* note 110, at 559; Greene, *supra* note 110, at 479; Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841, 855 (1977); Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1, 35-36 (1978). *Contra* Creswell, *supra* note 110, at 981.

128. *E.g.*, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 25 (1981) (Stevens, J., concurring in part and dissenting in part).

mental change from the opinion. Unless Justice Brennan was trying to sandbag the whole concept of implied rights,¹²⁹ the four factors ought to be taken for what he says they are: a distillation of prior case law to aid "in determining whether a private remedy is implicit in a statute not expressly providing one."¹³⁰ This advertence to the importance of the statute did, with the aid of hindsight, open the possibility of a restrictive approach. However, if *Cort* wrought any immediate change at all, it was in the direction of a further liberalization of the implication doctrine, given the decision's floodgate effect in the lower courts.¹³¹

The beginning of significant change did occur four years later in *Cannon v. University of Chicago*.¹³² Although six justices agreed to imply a private right of action to enforce Title IX of the Education Amendments of 1972,¹³³ the decision revealed deep divisions within the Court over the implication doctrine. Writing for the majority,¹³⁴ Justice Stevens phrased the issue as a "question of statutory construction"—that is, whether Congress intended to make a private remedy available—and stated that the four *Cort* factors are relevant "as indicative of such an intent."¹³⁵ This reformulation of *Cort* into a set of guideposts for resolving an issue of legislative intent represents at least an attempt at a more restrictive implication doctrine. *Cort* itself is more fairly read as a set of guideposts to aid the judiciary in the performance of a common-law function: fashioning appropriate remedies for violations of legislative-made primary law.¹³⁶

The long-term significance of *Cannon* lies only partly in this reformulation. Of potentially greater import is Justice Powell's dissent calling for a repudiation of *Cort*.¹³⁷ Powell's analysis is based on constitutional grounds, primarily the doctrine of separation of powers. He denounced *Cort* as inviting "independent judicial lawmaking"¹³⁸ in that application of the four factors test encourages courts to make choices about social policy that belong in the legislative domain.¹³⁹ *Erie*, specifically its rejection of

129. Cf. Greene, *supra* note 110, at 479.

130. *Cort*, 422 U.S. at 78.

131. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 408 n.17 (1982) (Powell, J., dissenting).

132. 441 U.S. 677 (1979).

133. Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified at 20 U.S.C. §§ 1681-1686 (1976)).

134. Justice Stevens' opinion was joined by Justices Brennan, Stewart, Marshall, and Rehnquist. 441 U.S. at 680. Justice Rehnquist filed a concurring opinion in which Justice Stewart joined. *Id.* at 717 (Rehnquist, J., concurring). Chief Justice Burger concurred in the judgment. *Id.* (Burger, C.J., concurring). Justice White, joined by Justice Blackmun, filed an opinion dissenting on the merits. *Id.* at 718 (White, J., dissenting). Justice Powell filed an opinion dissenting on the doctrinal basis of the decision. *Id.* at 730 (Powell, J., dissenting).

135. *Id.* at 688.

136. See Creswell, *supra* note 110, at 981.

137. 441 U.S. at 730 (Powell, J., dissenting).

138. *Id.* at 740 (Powell, J., dissenting).

139. *Id.* at 743 (Powell, J., dissenting). Justice Powell also stated that *Cort* "invites Congress to avoid resolution of the often controversial question whether a new regulatory

Swift v. Tyson, forms an important doctrinal link in Powell's reasoning. In order to overcome the substantial precedential force of *Texas & Pacific Railway v. Rigsby*,¹⁴⁰ he analyzed it as an example of the statutory-tort doctrine familiar to common-law courts, which was valid under *Swift*'s expansive view of the nature and role of the federal courts. The clear suggestion is that *Erie* vitiates whatever precedential force *Rigsby* once had, and that *Erie*'s limited view of the nature and role of federal courts is directly relevant to the implication issue.¹⁴¹

Intimations of *Erie* are an important element of Justice Rehnquist's "concurring" opinion,¹⁴² which reads more like an endorsement of the Powell position, and from which any reference to *Cort* is notably absent. Rehnquist notes that federal courts lack the powers of "state courts of general jurisdiction still enforcing the common law as well as statutory law."¹⁴³ The difference is dispositive, preventing the federal courts from venturing beyond the clear intent of Congress as they had in the bad old days of *Borak*.

Taken together, the Powell and Rehnquist opinions constitute a clarion call for reexamination of the implication doctrine in light of *Erie*'s supposed teachings concerning the federal courts. The Court had touched on some of these problems in *Wheeldin v. Wheeler*,¹⁴⁴ but promptly forgot them when it decided *Borak* a year later.¹⁴⁵ Not only did Powell's dissent, in particular, ensure that the matter would not go away, six months later, in *Transamerica Mortgage Advisors, Inc. v. Lewis*,¹⁴⁶ Powell claimed that a majority of the Court had adopted his position.¹⁴⁷

At issue in *Transamerica* was the availability of private enforcement of the Investment Advisers Act of 1940.¹⁴⁸ Except for a limited right to void advisers' contracts violative of the Act, the Court declined to imply any private right of action.¹⁴⁹ Justice Stewart's opinion is certainly a departure from *Cort*, which is not cited in his analysis.¹⁵⁰ He emphasizes the essentially statutory nature of the inquiry before the Court. Instead of moving mechanically through the four *Cort* factors, Stewart emphasizes

statute should be enforced through private litigation. Rather than confronting the hard political choices involved, Congress is encouraged to shirk its constitutional obligation and leave the issue to the courts to decide." *Id.* (Powell, J., dissenting).

140. 241 U.S. 33 (1916).

141. While Justice Powell does cite *Erie* in the dissent, that citation is more for the purpose of obtaining a quotation than a direct precedent. See 441 U.S. at 742 (Powell, J., dissenting).

142. *Id.* at 717 (Rehnquist, J., concurring).

143. *Id.* at 717-18 (Rehnquist, J., concurring) (emphasis added).

144. 373 U.S. 647, 651 (1963).

145. See Creswell, *supra* note 110, at 979.

146. 444 U.S. 11 (1979).

147. See *id.* at 25 (Powell, J., concurring).

148. *Id.* at 12-13; 15 U.S.C. § 80b-1 to -20 (1982).

149. The issue of voiding was straightforward given the fact that § 215 of the Act provided that contracts violative of it "shall be void." See 444 U.S. at 16-19.

150. Justice Stewart cited *Cort*, but only with reference to the plaintiff's argument, which was rejected. *Id.* at 14-15.

the existence of nonprivate remedies to enforce the relevant statute and the existence of private rights of action in *other* securities acts. The net result of this *inclusio unius* approach is the creation of a presumption against private rights of action, which seems similar, if not identical, to Justice Powell's suggested approach in *Cannon*. Indeed, Powell concurred in *Transamerica*, providing the fifth vote, on the ground that the Court's opinion was "compatible" with his *Cannon* dissent.¹⁵¹

Cort, however, was certainly not dead. In a strong dissent Justice White advocated *Cort*'s test as "[t]he preferred approach for determining whether a private right of action should be implied from a federal statute."¹⁵² As in *Cannon*, the *Cort* four-factor approach was presented as nothing more than a guidepost for determining legislative intent.¹⁵³

Despite suggestions concerning its demise,¹⁵⁴ *Cort* refuses to go away. In *University Research Association v. Coutu*,¹⁵⁵ Justice Blackmun, for a unanimous Court, applied the *Cort* test (at least the first three factors) in denying the existence of an implied right of action.¹⁵⁶ Three weeks later, in *California v. Sierra Club*,¹⁵⁷ the Court again unanimously found no implied right, but split sharply over the relevance of *Cort* to such an inquiry.¹⁵⁸ A majority of five reiterated that *Cort*, in its new incarnation as a means of divining legislative intent, offered the proper methodology for federal judges confronted with implication cases.¹⁵⁹ Justice Rehnquist's concurring opinion cast considerable doubt on the utility of *Cort*,¹⁶⁰ although he did not call for its abandonment as Justice Powell had done. Indeed, the latter's claim of victory in *Transamerica* is somewhat premature.

What is involved here is more than a matter of semantics, more than a determination of how a summary of federal jurisdiction should state the "better view" of the "law of implied rights of action." To begin with, whether the *Cort* approach is adopted will affect the outcome of cases. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*¹⁶¹ the Court, in a five-to-four decision, implied a private right of action for damages under the Commodity Exchange Act.¹⁶² Justice Stevens, writing for the majority, after brushing aside any separation of powers objections to implying private rights,¹⁶³ invoked *Cort* as providing the relevant frame of inquiry.¹⁶⁴ A

151. *Id.* at 25 (Powell, J., concurring).

152. *Id.* at 26 (White, J., dissenting) (emphasis added).

153. *Id.* at 27 (White, J., dissenting).

154. *Cf. Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 148-49 (1980).

155. 450 U.S. 754 (1981).

156. *Id.* at 770.

157. 451 U.S. 287 (1981).

158. *Id.* at 297; *id.* at 302 (Rehnquist, J., concurring).

159. *Id.* at 292-93.

160. *Id.* at 302 (Rehnquist, J., concurring).

161. 456 U.S. 353 (1982).

162. *Id.* at 389; 7 U.S.C. § 6b (1982).

163. 456 U.S. at 375-76.

164. *Id.* at 377-78.

slightly modified variant of *Cort* was unveiled. The third and fourth factors received some consideration,¹⁶⁵ particularly the contention that private enforcement enhances congressionally provided enforcement mechanisms.¹⁶⁶ However, the opinion emphasized legislative intent as determined by "Congress' perception of the law that it was shaping or reshaping."¹⁶⁷ Justice Powell dissented, returning to the themes of his *Cannon* opinion.¹⁶⁸ Recognition of the limited law-making role of the federal courts, which flows from the doctrine of separation of powers, argues against implication of private rights of action absent "'compelling evidence'" of legislative intent.¹⁶⁹ What Congress might have thought about the state of the law when it amended or failed to amend a particular statute cannot satisfy this burden.

As a general matter, it should not be surprising that the lower courts have had a field day with implying private rights under the *Cort* approach.¹⁷⁰ Taken on their face, the four factors are far more likely than not to lead to a decision in the plaintiff's favor at the threshold stage when the existence of his cause of action is challenged. This is most clearly the case with the third factor, at least if it is stated in terms of whether private enforcement is "consistent" with¹⁷¹ or "at least helpful"¹⁷² to the accomplishment of the statutory purpose, as opposed to "necessary."¹⁷³ Courts are all too ready to accept as a truism the notion that since Congress wanted enforcement, more enforcement cannot help but effectuate the statute's purpose.¹⁷⁴

Much the same can be said for the fourth factor, which focuses on whether the "area" is basically one of state law. Even though the concept of area is hopelessly ambiguous, there is obviously a federal statute in the case that arguably governs the conduct at issue. The presence of a federal norm creates a strong temptation to declare the area federal.¹⁷⁵

The second factor is likely to be inconclusive at best. In particular, evidence of "an explicit purpose to deny [a] cause of action"¹⁷⁶ rarely will be found. On the other hand, as *Cannon* and *Merrill Lynch* show, it is possible to dredge up bits of legislative history to show what Congress thought

165. *Id.* at 393-94.

166. *Id.* at 387.

167. *Id.* at 378 (footnote omitted).

168. *See id.* at 395 (Powell, J., dissenting). Justice Powell, however, did give grudging recognition to *Cort* as a guide to statutory intent. *Id.* at 396 n.1.

169. *Id.* at 408 (Powell, J., dissenting) (quoting *Cannon*, 441 U.S. at 749).

170. *See* 456 U.S. at 408-09 n.17; 2 R. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS § 8:37 (1982).

171. *Cort*, 422 U.S. at 78.

172. *Cannon*, 441 U.S. at 703.

173. *See* Steinberg, *supra* note 110, at 49.

174. *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 387 (1982).

175. *See, e.g.*, *Cannon*, 441 U.S. at 708-09. Justice Stevens treated the "area" as discrimination. Analytically, he might have treated it as education.

176. *Cort*, 422 U.S. at 82 (emphasis original) (footnote omitted).

the law was with respect to private enforcement, or would have desired if it had thought about the matter.

The original formulation of the first *Cort* factor—whether plaintiff was “one of the class for whose *especial* benefit the statute was enacted”¹⁷⁷—may have sounded like a formidable obstacle. Justice Brennan muddled the waters somewhat by suggesting that union members might meet this requirement when challenging illegal campaign contributions by their union even though corporate stockholders did not meet it when attempting to mount an analogous challenge to corporate expenditures.¹⁷⁸ In any event, later cases seem to have altered the formulation of this requirement as an inquiry into whether the statute creates rights in favor of the plaintiff or creates duties on the part of the defendant by proscribing conduct.¹⁷⁹ The typical implication controversy arises in the context of a federal regulatory statute or a statute that grants benefits. Plaintiffs that can survive a standing challenge will not generally have much difficulty showing the existence of rights or duties.¹⁸⁰ In sum, the practical effect of *Cort* probably has been to open the *Borak* floodgates even wider.¹⁸¹

The continuing debate within the Court over the validity of *Cort* as an approach to implication issues is also exceedingly important on a doctrinal level. Justice Powell's dissent in *Cannon* made manifest the need for a return to first principles in reconsidering the implication doctrine. For Powell, the outcome of such a reconsideration is determined by *Erie* and principles of separation of powers. The precept that federal courts are not common-law courts precludes the “lawmaking” which occurs when the *Cort* approach is followed. Implied rights of action are an impermissible form of federal common law. At least three other Justices appear to agree.¹⁸² Some commentators have taken direct issue with Powell and argued that implication is a proper area for the development of federal common law.¹⁸³

The majority of the Court has chosen to sidestep the issue by insisting that implying a right of action presents only an issue of statutory construction, and that *Cort* is an excellent tool for construing statutes. The problem with this position is that it rests on two false premises: that what is involved is statutory interpretation, and that *Cort* aids in this process. Applying *Cort* inevitably forces federal tribunals into making policy choices

177. *Id.* at 78 (emphasis original).

178. *See id.* at 81 n.13.

179. *See, e.g.,* Steinberg, *supra* note 110, at 43.

180. In order to show the harm requisite for standing, *e.g.,* *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972), a plaintiff will almost certainly have established the existence of a right, duty, or benefit.

181. The floodgate effect has taken place in the lower courts, which do not seem to have read the Supreme Court's mixed signals as calling for restraint. It can be argued that the lower courts are being quite faithful to the *Cort* approach.

182. Chief Justice Burger and Justices Rehnquist and O'Connor. *See supra* note 82.

183. *E.g.,* Frankel, *supra* note 110, at 553-54; Greene, *supra* note 110, at 492-93.

for the legislature rather than adhering to those already made or avoiding those that Congress refused to address.¹⁸⁴ This may, indeed, be a valid role for the federal judiciary, but the Supreme Court majority ought to articulate and defend it, rather than hide behind the cloak of "statutory construction."¹⁸⁵

More is at stake than doctrinal purity and terminological nicety. Judges and litigants are pretty much in the dark. Forced to defend *Cort* as something that it is not, the Supreme Court engages in continuing reformulation of the factors and refinement of their application. For example, the first factor—concerning the existence of rights-benefits or duties—appears to play a major role in the opinion denying a right of action in *Touche Ross & Co. v. Redington*.¹⁸⁶ On the other hand, the Court in *Merrill Lynch* found an implied right, but virtually ignored the first factor.¹⁸⁷ This process has produced some excellent scholarly writing on such arcana as what weight to ascribe to the factors, whether to apply a balancing test, or whether to require that all four criteria be met.¹⁸⁸

Yet, "the law" of implied rights of action is unpredictable and chaotic. In 1981 Justice Rehnquist noted that five of the last six cases in which courts of appeals had found implied rights of action had been overturned by the Supreme Court.¹⁸⁹ Part of the reason for this state of affairs is that, while the Supreme Court clings to the form of *Cort*, it has adopted a very restrictive approach to the implication of private rights of action under federal statutes.¹⁹⁰

C. What Has Caused the Restrictive Approach?

The reasons for the Court's abrupt shift in this area seem almost as obscure as the current state of the implication doctrine itself. Justice Stevens, whose tenure spans the doctrinal shift, has stated that the more narrow approach of recent cases reflects the Court's concern for the burgeoning case load of the lower federal courts.¹⁹¹ No other Justice has expressed directly this rather bizarre explanation for a major doctrinal shift.¹⁹² The extent to which the Court could "change the law" to help

184. See generally *Cannon*, 441 U.S. at 730 (Powell, J., dissenting); Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CALIF. L. REV. 80, 91-92 (1981).

185. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 194-95 (Supp. 1981).

186. 442 U.S. 560, 569-71 (1979).

187. Justice Stevens relied primarily on legislative history (the second factor), see 456 U.S. at 378-88, and to a lesser degree on the third and fourth factors, see *id.* at 393-94.

188. E.g., Steinberg, *supra* note 110, at 44-50.

189. *California v. Sierra Club*, 451 U.S. 287, 302-03 (1981).

190. On this matter, at least, the commentators are virtually unanimous. But see Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333, 1386 (1980).

191. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982).

192. It is true that other members of the court have joined Justice Stevens' opinions making this point. *Id.* at 354.

keep down the case load is far from clear.¹⁹³ The fundamental flaw in this explanation is that the current majority, including Justice Stevens, insists that current approaches to implication are grounded in congressional intent. Yet, Congress has not said anything calling for a more restrictive approach to implication cases. Indeed, it is the fact of congressional silence that creates the problem in the first place.

Commentators have suggested that the Court's shift is based on a recognition of the deleterious effects which private enforcement has on the securities markets.¹⁹⁴ Despite fragments of language that may support it,¹⁹⁵ this explanation is equally dubious. It is not known when or how the Court made the determinations that led to this "deep and perhaps justified disenchantment with private enforcement of the securities acts."¹⁹⁶ *Merrill Lynch* casts considerable doubt on whether the Court has adopted any such perspective. In finding an implied remedy in legislation regulating trading in commodity futures the Court relied in part on arguments by the government that "the private cause of action *enhances* the enforcement mechanism fostered by Congress."¹⁹⁷ In any event, policies based on presumed conclusions about how the securities acts are operating would not suffice to explain changes in generalized implication doctrine.

The most plausible explanation is that the Court has, in varying degrees, accepted the doctrinal validity of the criticisms set forth in Justice Powell's *Cannon* dissent. Thus, it is no coincidence that the limitation process began in *Cannon*—not in *Cort*—in which even the majority stressed the legislative role in implication of rights of action.¹⁹⁸ Justice Powell has not achieved his ultimate goal: the virtual elimination of implied private rights through adoption of a requirement of "compelling evidence" of congressional intent. But his views have succeeded in stopping and reversing a pattern of untrammelled growth. In this respect, the implication doctrine represents an area in which the new *Erie* doctrine has had a considerable impact.

The changes in this area triggered by Justice Powell have generated an outpouring of academic criticism.¹⁹⁹ Before dealing with these criticisms it is important to consider whether developments in the area of implied rights are an isolated phenomenon or are part of a broader pattern. The

193. One might argue that changes in the area of § 1983 litigation such as the *Younger* doctrine also are based on case-load considerations. It seems fairly clear, however, that considerations of federalism are paramount in this area.

194. Frankel, *supra* note 110, at 553, 563, 584.

195. *See id.* at 563 n.59. Conceivably this is what Justice Stevens had in mind when he referred to the increased complexity of federal legislation. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982).

196. Frankel, *supra* note 110, at 553.

197. 456 U.S. at 387 (emphasis added).

198. *Cannon*, 441 U.S. at 717.

199. *E.g.*, Frankel, *supra* note 110; Greene, *supra* note 110; Stewart & Sunstein, *supra* note 57.

latter appears to be the case. The new *Erie* doctrine has a potentially broad sweep. This point can be illustrated by considering briefly actual and potential developments in two different areas: "classic" federal common law and "*Bivens*" actions.

III. WHERE MIGHT THE NEW *ERIE* DOCTRINE STRIKE NEXT?²⁰⁰

A. Classic Federal Common Law

Since the Court treats the issues of implication and development of federal common law as two distinct questions, there may be some doubt as to whether conclusions drawn from one may be applied to the other. There are classes of cases, however, that do represent the specialized federal common law which survived after the decision in *Erie*.²⁰¹ Prominent among these is formation of a federal common law of nuisance to deal with interstate disputes.²⁰² In *City of Milwaukee v. Illinois*²⁰³ (*Milwaukee II*) the new *Erie* doctrine struck with a vengeance in this area.

At issue was an attempt by Illinois to enjoin discharges by Milwaukee sewage treatment facilities. In 1972 the Supreme Court had held unanimously that such a claim could be heard in the federal district court and would be governed by federal common law.²⁰⁴ Subsequently Congress passed the Federal Water Pollution Control Amendments of 1972, establishing a complex system of federal regulation.²⁰⁵ The Milwaukee facilities were operated under permits issued in accordance with this system. Nonetheless, the lower courts ruled that Illinois could invoke the federal common law and that Milwaukee could be subjected to a higher standard of conduct than that required by its permits.²⁰⁶ By a six-to-three majority the Supreme Court reversed, holding that there was no place for judicially developed federal law in such a matter.²⁰⁷ Justice Rehnquist, for the majority, began by citing *Erie* for the proposition that the law-making

200. Cf. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 63 (1976) (Brennan, J., dissenting).

201. See, e.g., Note, *supra* note 62, at 1512.

202. See, e.g., Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41 (1983).

203. 451 U.S. 304 (1981).

204. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-108 (1972) (*Milwaukee I*).

205. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified at 33 U.S.C. §§ 1251-1376 (1976 & Supp. V 1981)).

206. The district court held that the plaintiffs had proven the existence of a nuisance under federal common law in both the discharge of inadequately treated sewage and discharge from sewer overflows. The court of appeals affirmed in part and reversed in part, holding that the 1972 amendments did not preempt the federal common law of nuisance, but the court had to look to the policies and principles of the Act for guidance. Accordingly, the court of appeals "reversed the District Court insofar as the effluent limitations it imposed on treated sewage were more stringent than those in the . . . regulations." 451 U.S. at 312.

207. *Id.* at 332.

powers of the federal courts are limited, and that the primary law-making competence is that of Congress. Not only had Congress "addressed" the issue of interstate water pollution, it had "occupied the field"²⁰⁸ through the establishment of a comprehensive program. In light of such action by the hierarchically superior body, Justice Rehnquist saw "no room for courts to attempt to improve on that program with federal common law."²⁰⁹ Justice Rehnquist did not rely specifically on congressional intent to exclude the federal courts, although one critic has termed his analysis an example of "implied intent."²¹⁰ Nonetheless, Justice Rehnquist spoke in terms of preemption. Naturally the analysis is not the same as in the typical preemption case in which a presumption exists that Congress has not intended to occupy the field. Rather, Justice Rehnquist appeared to erect a contrary presumption when the matter is one of federal law, given Congress' superior capacity to make law and ability to protect state interests.²¹¹

Milwaukee II is a highly important case in several respects. On the doctrinal level it shows just how far some members of the Court are willing to take the new *Erie* doctrine. Despite Justice Rehnquist's reference to the federalism component of *Erie*, *Milwaukee II* is obviously a separation of powers decision.²¹² The decision is not whether to apply state instead of federal law, but whether to limit the law governing an admittedly federal case to law established by the federal legislature. Justice Rehnquist recognized this point himself.²¹³ The fundamental premise of the new *Erie* doctrine—preference for the Congress as the only federal law-making body—comes through loud and clear.²¹⁴ Justice Rehnquist stresses that utilization of a judge-made law of nuisance requires the application of "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence."²¹⁵ He also stresses the superiority of legislatively supervised administrative approaches to the issue of water pollution, as opposed to an active role for the judiciary in this complex area. In the case at bar,

208. *Id.* at 315 n.8, 317.

209. *Id.* at 319.

210. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41, 51 (1983).

211. *See* 451 U.S. at 317.

212. *Id.* at 312-13, 315.

213. *Id.* at 310 n.4, 319 n.14; *see* Note, *Federal Common Law Under Federal Statutes*, 95 HARV. L. REV. 290, 295 n.50 (1981).

214. When Congress has not spoken . . . , however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," . . . the Court has found it necessary, in a "few and restricted" instances . . . to develop federal common law. . . . Nothing in this process suggests that courts are *better suited* to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable.

451 U.S. at 313 (citations omitted) (emphasis added).

215. *Id.* at 317.

Justice Rehnquist's reservations about judicial competence were buttressed by the admission of the district court that it did not comprehend some of the testimony before it.

It is particularly significant that this retrenchment on the part of the federal judiciary should have occurred in the area of interstate pollution. There is a long history of federal common-law decisions governing such matters, including *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,²¹⁶ a decision rendered on the same day as *Erie* itself. In contrast to Justice Rehnquist, Justice Blackmun offered a somewhat different vision of the role of federal authorities in this area: The federal courts may act in essentially a partnership role with Congress, thereby complementing "congressional action in the fulfillment of federal policies."²¹⁷ For Justice Blackmun, no issue of intermeddling or violation of the separation of powers was involved; rather, he envisaged a "cooperative interaction" that is peculiarly suitable when the only law to be applied is federal law.²¹⁸ Blackmun's approach is analogous to the joint venture envisaged by the Court in *Milwaukee I*, with federal courts utilizing statutes as well as filling in any resultant gaps. Nonetheless, Justice Rehnquist could not have been more adamant in his rejection of any such role for the federal courts in this area. A decision reversing the court below might have been based on the more narrow ground of the need to leave administrative regulation unencumbered by judicial supervision as a matter of sound policy.²¹⁹ Justice Rehnquist, however, took no such half measures. Indeed, with respect to the imposition of effluent limitations more stringent than those imposed by the EPA, he stated flatly that federal courts "lack authority" to do so.²²⁰

The implications of *Milwaukee II* are not entirely clear. Its most obvious effects will be felt in the area of federal common law dealing with environmental issues. In conjunction with *Milwaukee II*, the subsequent decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association*²²¹ effectively eliminated any role for federal common law in the field of water pollution. Given the relative brusqueness of the holding in *Sea Clammers*, it has been suggested that "the abrogation of federal common law in all forms of environmental legislation appears almost inevitable."²²² The reason for such concerns is that some federal legislation will likely be found when it comes to virtually any aspect of regulation of the environment. It is a very short step from recognizing that Congress has passed legisla-

216. 304 U.S. 92 (1938).

217. *Milwaukee II*, 451 U.S. at 334 (Blackmun, J., dissenting).

218. *Id.* at 333 n.2 (Blackmun, J., dissenting).

219. Bleiweiss, *Environmental Regulation and the Federal Common Law of Nuisance: A Proposed Standard of Preemption*, 7 HARV. ENVTL. L. REV. 41, 57 (1983).

220. 451 U.S. at 320.

221. 453 U.S. 1 (1981).

222. Note, *Preemption of Federal Common Law—City of Milwaukee v. Illinois*, 31 DE PAUL L. REV. 201, 223 (1981).

tion to concluding that Congress has addressed the matter and, therefore, there is no role for the federal courts.²²³

Beyond the field of environmental law, it may be premature to contend that the kind of federal common law envisaged by Judge Friendly is rapidly on the road to extinction.²²⁴ But what stands out in the *Milwaukee II* opinion is the Court's grudging acceptance of any form of federal common law, and Justice Rehnquist's deprecation of it as "only a necessary expedient,"²²⁵ as opposed to what Judge Friendly saw as a logical, even "beautiful," resolution of the federal judicial role in areas of admitted national sovereignty.²²⁶ It is true that Justice Rehnquist cited²²⁷ (one hesitates to say with approval) such cases as *Clearfield Trust Co. v. United States*²²⁸ and Justice Jackson's opinion in *D'Oench, Duhme & Co. v. FDIC*.²²⁹ Viewed from a broader perspective, it seems reasonable to infer that any branches of federal common law which remain alive will be clipped sharply and deprived of generative force. For example, any attempt to extend *Clearfield*-type common law—based on the presence of a federal instrumentality or program—to disputes involving purely private parties is virtually certain to fail. While such a development may have been implicit in the earlier case of *Bank of America National Trust & Savings Association v. Parnell*,²³⁰ it became explicit in the 1977 decision in *Miree v. DeKalb County*.²³¹ Even though Justice Stevens has suggested that there may be a role for federal common law in this area,²³² any such extension of federal common law seems totally incompatible with the thrust of the new *Erie* doctrine as accepted in *Milwaukee II*.

B. Rethinking Bivens

Perhaps the most striking example of how far rigorous application of the new *Erie* doctrine might lead is Justice Rehnquist's dissenting opinion in *Carlson v. Green*.²³³ In *Carlson*, Rehnquist called upon the Court to reject the practice begun in *Bivens v. Six Unknown Federal Narcotics Agents*²³⁴ of implying damage remedies directly under the Constitution. *Bivens* settled

223. Cf. *id.* at 223-25.

224. Professors Stewart and Sunstein, however, take the position that "[t]he 'mid-twentieth century type of federal common law' celebrated by Judge Friendly seems rapidly headed for oblivion." Stewart & Sunstein, *supra* note 57, at 1223.

225. 451 U.S. at 319 n.14.

226. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 422 (1964).

227. 451 U.S. at 313-14.

228. 318 U.S. 363 (1943).

229. 315 U.S. 447 (1942).

230. 352 U.S. 29, 33 (1956).

231. 433 U.S. 25, 30 (1977).

232. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77, 90 (1981).

233. 446 U.S. 14, 31 (1980) (Rehnquist, J., dissenting).

234. 403 U.S. 388 (1971).

the long standing issue of whether such remedies were available in the context of alleged fourth amendment violations. The Court extended the availability of a *Bivens* action in *Davis v. Passman*²³⁵ to the context of discrimination allegedly violative of the fifth amendment, and in *Carlson* to the availability of damages on behalf of a federal prisoner whose confinement and treatment allegedly violated the eighth amendment.²³⁶ Although there was sharp disagreement within the Court over the methodology to be utilized in *Bivens* actions,²³⁷ only Justice Rehnquist urged its abandonment, characterizing the decision as a "wrong turn."²³⁸ Justice Rehnquist invoked *Erie* for the bedrock principle that federal courts may not "declare rules of general common law in civil fields."²³⁹ He characterized the availability of *Bivens* actions as an example of the type of federal common law that *Erie* had rejected. Although federalism concerns play some role in Justice Rehnquist's analysis,²⁴⁰ the principal thrust of his objections is rooted in the doctrine of separation of powers. Justice Rehnquist emphasized that the issues to be considered in the decision whether or not to allow *Bivens* actions—types of damages, compensable injuries, degree of intent, and the availability of immunity—represent policy questions that are more appropriately made by legislatures than by courts.²⁴¹ Thus, the Court had invaded the legislature's domain, and fidelity to the principles of *Erie* required a repudiation of *Bivens*.

It is not likely that Justice Rehnquist's impassioned plea will sway a majority of his colleagues to abandon *Bivens*-type damages actions. It must be noted in passing, however, that Justice Powell was also more or less alone when he set out on his crusade against *Cort v. Ash*.²⁴² In any event, Congress may well render this issue moot by enacting legislation substituting a cause of action against the United States for *Bivens* suits.²⁴³ Nonetheless, as in the case of Justice Powell's *Cannon* dissent, Justice Rehnquist's analysis forces a reconsideration of the bases on which *Bivens* and its progeny rest.

To begin with, one must consider why implication of rights of action and accompanying remedies under the Constitution should be treated any differently from implication under federal statutes. Obviously, treating

235. 442 U.S. 228, 248 (1979).

236. 446 U.S. at 24.

237. Justice Brennan formulated what amounts to a presumption of the availability of any appropriate relief. The presumption can be defeated if "special factors" are present, or if Congress has explicitly provided an alternative remedy. *Id.* at 18-19. Justice Powell rejected this approach as both overly inclusive and insufficiently flexible. *Id.* at 25-30 (Powell, J., concurring).

238. *Id.* at 32 (Rehnquist, J., dissenting).

239. *Id.* at 38 (Rehnquist, J., dissenting).

240. *See id.* at 42 (Rehnquist, J., dissenting).

241. *See id.* at 39, 51 (Rehnquist, J., dissenting).

242. 422 U.S. 66 (1975).

243. *See generally* Madden, Allard & Remes, *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469 (1983).

them the same way would be a substantial point in Justice Rehnquist's favor, given the developments since *Cannon*. Some members of the Court have indicated their apparent belief that the two inquiries are in fact similar.²⁴⁴ It is not unusual to find cases in the statutory context citing constitutional precedents, just as the statutory cases played a role in the development of the constitutional jurisprudence.²⁴⁵ Commentators have regarded the two inquiries as essentially the same.²⁴⁶ Indeed, during the formative period of the *Bivens* doctrine, the practice of implying remedies under statutes was invoked as a principal justification for the somewhat newer practice of implication from the Constitution.²⁴⁷ Nonetheless, the Supreme Court insisted in *Davis v. Passman* that the two inquiries are quite separate, and rebuked the lower court for utilizing *Cort* analysis in the context of *Bivens* implication.²⁴⁸ Justice Brennan cited as one reason for the distinction the fact that the Constitution does not "'partake of the prolixity of a legal code.'" ²⁴⁹ Some statutes do not exhibit any such prolixity either.²⁵⁰ Perhaps more to the point, a statute emanates from a legislative body that may well have considered the issue of judicial enforcement of particular provisions at the time of enactment. On the other hand, the role of the judiciary in enforcing constitutional rights, while not explicitly spelled out, is unquestionably part of the inherent plan of the Constitution. The need to be faithful to the commands of the instrument suggests that judicial relief was intended to be available to redress violations of direct prohibitions of governmental actions such as those contained in the Bill of Rights.²⁵¹ Thus, *Bivens* can be seen as a classic example of constitutional adjudication,²⁵² analogous to, and even compelled by, *Marbury v. Madison*.²⁵³

The problem with the "constitutional" analysis of *Bivens* is that the Court has repeatedly suggested, beginning in that decision itself, that Congress has the power to alter the results reached and to change the remedial

244. *E.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 402-03 (1971) (Harlan, J., concurring).

245. For example, Justice Brennan's opinion in *Bivens* cited *Borak*, 403 U.S. at 397, and his opinion in *Cort* cited *Bivens*, 422 U.S. at 78.

246. *E.g.*, Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 24 (1975).

247. *E.g.*, Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1551-52 (1972).

248. 442 U.S. 228, 240-42 (1979).

249. *Id.* at 241 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

250. Broad antidiscrimination provisions such as § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976 & Supp. V 1981) are examples of such nonprolixity.

251. *See Davis*, 442 U.S. at 241-42; Student Project, *Constitutional Torts Ten Years After Bivens*, 9 HOFSTRA L. REV. 943, 958 (1981).

252. *See Schrock & Welsh, Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1136 (1978); Student Project, *Constitutional Torts Ten Years After Bivens*, 9 HOFSTRA L. REV. 943, 967 (1981).

253. 5 U.S. (1 Cranch) 137 (1803).

scheme for violations by federal officials of the Bill of Rights.²⁵⁴ How can this be so if the decision rests on and implements a constitutional guarantee? Professor Henry Monaghan offers a persuasive resolution of this dilemma in his concept of "constitutional common law," of which *Bivens* itself is an example.²⁵⁵ Professor Monaghan posits the existence of a subconstitutional body of common law, including a common law of civil liberties. The advantage of this formulation is that it permits Congress to play a coequal role in the fashioning of such a body of law and "should increase the likelihood that Congress' special institutional competence will be brought to bear on the problems of protecting individual liberty."²⁵⁶ The Monaghan thesis has been challenged on the ground that the Court lacks authority to engage in "subconstitutional judgment of utility or desirability" about the acts of other branches or levels of government.²⁵⁷ Nonetheless, the thesis explains the Court's apparent willingness to let Congress change the law with respect to *Bivens* actions.

This approach, however, leads to another conceptually difficult question: What should be the effect of a congressional statute which gives *Bivens*-type plaintiffs so much less than they currently receive that it arguably can be characterized as providing no remedy at all? In his only reference to such a possibility, Professor Monaghan states cryptically that the Court would "inquire only whether the statute was unconstitutional under traditional tests—treating the statute's conflict with the Court's own prior rule as a factor to consider, but not as dispositive of unconstitutionality."²⁵⁸ The Court has tiptoed around the issue, suggesting that Congress has more or less the last word, but that the adequacy of any alternative remedy might be a relevant factor.²⁵⁹ The Court's ambiguous declarations have led most commentators to conclude that the judiciary would have the final say as to whether any alternative remedy "affords comparable vindication of the constitutional provision involved."²⁶⁰

The possibility of Congress enacting a statute that gives plaintiffs considerably less than they currently enjoy is not entirely hypothetical. Given a time of great concern for the public fisc, one could envisage a statute

254. *E.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (Brennan, J.).

255. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24 (1975).

256. *Id.* at 28.

257. Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1126-45 (1978).

258. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975).

259. *See, e.g.*, *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (Congress must provide an explicit alternative remedy which it views as equally effective to *Bivens* remedy).

260. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1548 (1972); *see also* Madden, Allard & Remes, *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 474-75 (1983).

that limited damages, denied punitive damages, withdrew the right to jury trial, and allowed the government to assert the good faith of its employee as a defense.²⁶¹ Other restrictions might include rigid statutes of limitation and the nonavailability of attorneys' fees. At this point Justice Rehnquist's questioning of *Bivens* takes on considerable relevance. To the extent that he can persuade the Court that the creation of remedies for constitutional violations is essentially a legislative task, the Court will show greater deference to any legislation that is enacted when and if it is challenged as "unconstitutional."

IV. THE COURT AND ITS CRITICS—THE GAP WIDENS

A. *The Implication Debate*

The Court's retreat from *Borak* has generated a steady barrage of criticism,²⁶² despite the fact that the extent of this retreat is far from clear given decisions like *Merrill Lynch* and *Cannon*.²⁶³ Critics appear divided on whether a rehabilitation of *Cort* would be sufficient or whether it is necessary to return full scale to the *Borak* approach.²⁶⁴ For the Court the choice must ultimately come down to something like the latter or an acceptance of Justice Powell's position denying implication of private rights of action except in cases of compelling congressional intent. Despite the majority's attempt to cling to *Cort* as a middle ground, this position will prove to be untenable.²⁶⁵ Moreover, because the four *Cort* factors are so inherently capable of manipulation and differing applications, the conflict and confusion that adherence to the *Cort* approach has generated in the lower courts²⁶⁶ are certain to continue until *Cort* is abandoned. Although the issue is not free from doubt, Justice Powell's position appears to be correct in light of overall considerations as to the nature and role of the federal courts.

It is possible to divide the critics' arguments into two categories: functional and doctrinal. As for the functional criticisms, perhaps the most basic argument in favor of *Borak* or something similar is that private enforcement equals more enforcement and, therefore, furthers the goals of the

261. See Madden, Allard & Remes, *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 479-90 (1983).

262. E.g., Frankel, *supra* note 110, at 559; Greene, *supra* note 110, at 479. *Contra* Fischel, *Secondary Liability Under Section 10(b) of the Securities Act of 1934*, 69 CALIF. L. REV. 80, 90-91 (1981). Professor Fischel is critical of *Cort* and supportive of the results in recent Supreme Court decisions denying rights of action in the securities regulation context. See *id.* at 90-91, 111. It is not clear whether he would adopt an approach as restrictive as Justice Powell's. See *id.* at 111 (intent of Congress is only proper and relevant inquiry).

263. See Note, *Implied Private Right of Action Under the Commodity Exchange Act: Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 36 SW. L.J. 1055, 1067 (1982). See generally Hazen, *Implied Private Remedies Under Federal Statutes: Neither a Death Knell nor a Moratorium—Civil Rights, Securities Regulation, and Beyond*, 33 VAND. L. REV. 1333, 1361-64 (1980).

264. Compare Steinberg, *supra* note 110, at 44-50, with Frankel, *supra* note 110, at 553-54.

265. See *supra* text accompanying notes 184-88.

266. See, e.g., Stewart & Sunstein, *supra* note 57, at 1197.

statute.²⁶⁷ The problem with this statement is that it is not always true. In many instances private enforcement can upset a balance established by Congress in enacting a statute and lead to a form of over-enforcement that defeats the statutory goal. In the regulatory context, Professor Frankel has argued persuasively that private enforcement actions may be "ill-suited to the deterrence system of the securities laws and may hamper the central purposes of those statutes."²⁶⁸ Similarly, in the context of grant-in-aid programs private damages actions may seriously diminish grantee resources and detract from the overall achievement of program goals.

A somewhat related objection to a strict implication doctrine is that private enforcement rights are needed in order to compensate persons who have suffered an injury.²⁶⁹ The compensation argument has somewhat more force given the gut reaction that the legal system is somehow incomplete if it creates rights and duties but does not provide redress for those harmed by violation of such norms.²⁷⁰ While it is true that an injured party may have recourse to some relief through the administrative process, this relief is unlikely to include monetary damages, and the adequacy of administrative relief is frequently open to question.²⁷¹ A possible response to the compensation argument is that state common-law remedies may well be available, at least if the area of law is not one of exclusive federal jurisdiction. For example, a state derivative action clearly would have been available in *Cort*, and the issue of whether state law incorporated the federal standards could have been dispositive.²⁷² Perhaps the best rebuttal to the compensation argument is that regulatory administration might be considered "an independent system of normative ordering" whose remedies if any were intended to mark the outer limits.²⁷³

It also has been argued that the Court's current approach and its purported emphasis on legislative intent will almost invariably lead to finding no implied right of action,²⁷⁴ and that this approach is just one more example of an overall attempt to limit access to the federal courts.²⁷⁵

267. E.g., Greene, *supra* note 110, at 469-70; see Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841, 855 (1977); Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1, 15-16 (1978).

268. Frankel, *supra* note 110, at 570.

269. E.g., *id.* at 566-67; Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1, 37 (1978); Steinberg, *supra* note 110, at 51.

270. See Stewart & Sunstein, *supra* note 57, at 1228.

271. See, e.g., *Cannon v. University of Chicago*, 441 U.S. 677, 708 n.42 (1979).

272. See *Cort*, 422 U.S. at 72 n.6. But see Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841, 855-56 (1977).

273. Stewart & Sunstein, *supra* note 57, at 1228-29.

274. E.g., Note, *Implied Private Rights of Action and Section 1983: Congressional Intent Through a Glass Darkly*, 23 B.C.L. REV. 1439, 1470 (1982).

275. Morrison, *Rights Without Remedies: The Burger Court Takes the Federal Courts Out of the Business of Protecting Federal Rights*, 30 RUTGERS L. REV. 841, 854 (1977); Pillai, *Negative Implication: The Demise of Private Rights of Action in the Federal Courts*, 47 U. CIN. L. REV. 1, 38 (1978).

Both of these statements are true but they serve mainly to restate the basic question: Should federal courts adopt a hospitable attitude toward implied rights of action?

Many critics have focused on particular features of the judicial process vis-à-vis the legislative process as strong justification for an active role in the implication of private rights. Because of the necessary incompleteness of any legislative text, it may well be normal to expect the judiciary to be ready and willing to fill in the blanks, so to speak.²⁷⁶ In addition, courts have the advantage of an after the fact view which permits them to remedy any defects in the legislative scheme that were not apparent at the preenactment stage.²⁷⁷ In fact, the legislature may well have expected that the judiciary would act to fill any void.²⁷⁸ These arguments are inevitably bound up with doctrinal aspects of the separation of powers, and consideration of them will be deferred briefly.

Indeed, it is in the doctrinal realm that the most forceful arguments against a restrictive approach have been advanced. Again, one can see the influence of Justice Powell's dissent in *Cannon v. University of Chicago*,²⁷⁹ and the resultant debate over the judicial role. Two of the doctrinal arguments can be dismissed relatively quickly. The first is that the presence of the general federal question jurisdiction is sufficient justification for the practice of implying rights of action from federal statutes that are silent on the question.²⁸⁰ Professors Stewart and Sunstein are surely correct in stating that "general jurisdictional statutes cannot plausibly be read to authorize judicial creation of private rights of action."²⁸¹ Such a reading is not justified by the *Bivens* line of cases in which the courts perform a function that can be said to be inherent in the constitutional plan. Bootstrapping from the jurisdictional grants is a way of finessing rather than resolving the implied rights issue.

Second, the argument has been advanced that any separation of powers concerns are mitigated or eliminated by the fact that Congress can step in to correct implication decisions that go against the legislative will.²⁸² This contention misses the core of the implication issue: who is to have the *first* word on the subject. It is also worth noting that one cannot consistently argue that the availability of Congress justifies implied rights of action while at the same time arguing that they are necessary since Congress is not in a position to provide them.

276. See Steinberg, *supra* note 110, at 41, 51; Stewart & Sunstein, *supra* note 57, at 1231.

277. See Frankel, *supra* note 110, at 566; Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 373 (1976).

278. See, e.g., Steinberg, *supra* note 110, at 47-48.

279. 441 U.S. 677, 742 (1979) (Powell, J., dissenting).

280. Greene, *supra* note 110, at 498-505.

281. Stewart & Sunstein, *supra* note 57, at 1221.

282. See Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 375 (1976); cf. Greene, *supra* note 110, at 493-94, 505 (Congress may delegate law-making power to federal courts, and consequently may restrict same).

Far more serious is the argument that Justice Powell's position deprives the courts of a societally useful²⁸³ and constitutionally necessary²⁸⁴ power. Professors Stewart and Sunstein have argued that just as courts in the age of the common law played a dominant role in the protection of individual rights and liberties, they must continue to play that role in the age of the administrative state.²⁸⁵ Whether placed on such a lofty plane or justified as simply "filling in the gaps,"²⁸⁶ there is no question that the implication of private rights of action is thus analyzed as exercise of a common-law power. There is a question, however, whether *federal* courts can engage in such an activity given the limitations on their nature and role that have been derived from *Erie*.

The thrust of *Erie* is that federal common law is to be the exception rather than the rule, and that state law shall apply "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress."²⁸⁷ Justice Brandeis' coupling of the Constitution and Congress may justify the current Court's reappraisal of federal common law in light of *Erie*. In many instances Congress does authorize the creation of federal common law. Examples are section 301 of the Labor Management Relations Act, construed in *Textile Workers Union v. Lincoln Mills*,²⁸⁸ and 42 U.S.C. § 1983. Other examples of federal common law may well be compelled by the constitutional scheme. This would explain the creation of such a body of law in the areas of interstate disputes and international law.²⁸⁹ By hypothesis, no congressional action governs the "matter" of whether to imply a right of action, and it would not seem to fit within the narrow body of federal common law whose creation is required by the structure and enumeration of powers contained in the Constitution itself. Additional support for Justice Powell's position may, perhaps must, be found in the doctrine of separation of powers.

It seems unlikely that the "law of separation of powers" gives any clear answer to the question of the validity of implied rights of action. In cases such as *Immigration & Naturalization Service v. Chadha*²⁹⁰ (the legislative veto case) a specific text of the Constitution seems to offer a fairly clear answer to a separation of powers issue.²⁹¹ The argument that Congress possesses the legislative power is at least partially checked by the fact that

283. Frankel, *supra* note 110, at 566-67.

284. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957).

285. Stewart & Sunstein, *supra* note 57, at 1199-1200, 1311-12.

286. Note, *Implication of Private Actions from Federal Statutes: From Borak to Ash*, 1 J. CORP. L. 371, 388-89 (1976).

287. *Erie*, 304 U.S. at 78.

288. 353 U.S. 448 (1957).

289. *E.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426-27 (1964) (international law); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (interstate disputes).

290. 103 S. Ct. 2764 (1983).

291. *Id.* at 2781-84; *see also* *Buckley v. Valeo*, 424 U.S. 1, 120-24 (1976).

article III courts possess the judicial power.²⁹² On the other hand, arguments that well-settled inroads on a pure concept of separation of powers, such as the delegation doctrine, clearly authorize judicial law making²⁹³ are not conclusive either. While the delegation cases do establish the validity of forms of law making by nonlegislative entities they cannot answer the question of the post-*Erie* authority of federal courts to engage in similar activities.

To some extent, Justice Powell's position is supported by the functional aspects of the separation of powers doctrine. His critics call on courts to perform highly sophisticated tasks for which they simply may not be suited. For example, Professor Frankel would have courts engage in an ongoing assessment of the utility of "private litigation in its present form as a tool of securities regulation."²⁹⁴ It is not clear that courts as we know them are capable of undertaking such empirical investigations, especially when, as Professor Frankel admits, "existing studies support no firm conclusions."²⁹⁵ Congress, on the other hand, frequently demonstrates its competence in the area by expressly providing for private relief,²⁹⁶ either at the point when legislation is enacted or during the periodic amendments that most statutes undergo. As for Congress' "wanting" the courts to engage in implication, much can be said for Justice Rehnquist's position that it ought to say so,²⁹⁷ especially given the constitutional doubt over judicial authority in this area.

Functional arguments aside, Justice Powell's position, and the new *Erie* doctrine generally, rest on deeply held views about the relationship between the courts and the legislative branch.²⁹⁸ As Justice Powell notes, judicial decisions affect many people not before the court.²⁹⁹ To the extent that they did participate or might have participated in legislative deliberations concerning the same subject, there are serious questions of fairness, perhaps of legitimacy, if judicial resolutions are added on to those arrived at through the open give and take of the legislative process. The Powell position also represents a reaction against turning to the courts for solutions to problems in instances in which legislative solutions might have

292. See *supra* text accompanying notes 61-62.

293. *E.g.*, Greene, *supra* note 110, at 488-93.

294. Frankel, *supra* note 110, at 570.

295. *Id.*; see also Stewart & Sunstein, *supra* note 57, at 1321 (courts should not imply rights of action "when a statutory norm is vague or ambiguous, delegates broad managerial authority, or presents a context in which coordination and consistency in regulatory policy is important").

296. *E.g.*, 16 U.S.C. § 1540(g) (1982); 31 U.S.C. § 1244(a) (1976).

297. *Cannon v. University of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring).

298. It is important to note that Justice Powell's position is not based on any notion of deference to the expertise of the *administrative* agency involved. *Cf.* Stewart & Sunstein, *supra* note 57, at 1208-11 (agencies' interpretation of statutes should guide courts' enforcement).

299. *Cannon v. University of Chicago*, 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

been available. This explains Powell's emphasis on the floodgate of cases that began to appear as a result of liberal, and probably justifiable, applications of the *Cort* analysis. Although he has been accused of slamming the courthouse door, Powell's emphasis rests partly on the need to open other doors, notably those of the legislative branch. Again, this consideration comes through loud and clear in *Cannon* when he notes that judicial activism can induce the legislature to shirk its own responsibility.³⁰⁰ Indeed, Justice Powell might even be prepared to concede some of the functional points, such as the ability of courts to deal with issues presented by the creation of damages remedies. His response probably would be analogous to that of Chief Justice Burger in the *Chadha* case: Even if implication of rights is an easy way to get to particular results, the Constitution nonetheless sometimes requires that the hard way be followed, and following it is essential in the long run for the salutary functioning of our various institutions.³⁰¹

What is striking is that Justice Powell advocates the superiority of the legislative process over the judicial at a period when many are arguing precisely the contrary. Thus, the implied rights debate can be seen in a broader context as part of the debate over judicial activism.³⁰² In this respect it may be instructive to examine the view of the role of courts in American society exemplified by the work of Professor Guido Calabresi. Calabresi's call for an activist role on the part of the courts in the context of obsolete statutes helps put the implied rights debate in better perspective.

B. Guido Calabresi's Roving Commission

A striking example of the gap between the cutting edge of academic thinking and the views of the Supreme Court—or at least some members thereof—as to the nature and role of the judicial process can be found in Professor Calabresi's much discussed book, *A Common Law for the Age of Statutes*.³⁰³ Calabresi's overall thesis can be stated succinctly. The days

300. *Id.* (Powell, J., dissenting).

301. See 103 S. Ct. at 2788.

302. Senator John East's proposed Judicial Reform Act of 1982 contained a section providing that "[n]o Act of Congress shall be construed to grant to any party any cause of action at law or in equity unless that Act expressly grants such a cause of action." S. 3018, 97th Cong., 2d Sess. § 171 (1982). The bill was an across the board attempt to curtail the role of the federal courts. Other provisions would have limited § 1983 litigation and abolished the general federal question jurisdiction.

303. G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982). For book reviews of Calabresi, see, e.g., Coffin, *The Problem of Obsolete Statutes: A New Role for Courts?*, 91 YALE L.J. 827 (1982); Cox, Book Review, 70 CALIF. L. REV. 1463 (1982); Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126 (1982); Hill, *Calabresi: An Addendum*, 82 COLUM. L. REV. 1779 (1982); Hurst, Book Review, 67 MINN. L. REV. 536 (1982); Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752 (1982); MacIsaac, *Common Sense About the Age of Statutes*, 81 MICH. L. REV. 754 (1983); Mikva, *The Shifting Sands of Legal Topography*, 96

of the common law's dominant position within the legal system are over. For some time now, the bulk of law making has been done by legislative bodies. There are on the books, however, a large number of statutes that have become obsolete both because they no longer serve any purpose which could command majoritarian political support, and because they are out of phase with the "legal landscape"—that is, the general principles of the legal system. "Legislative inertia" prevents the legislative bodies from remedying this extremely serious situation. Courts, on the other hand, are in an ideal position to do something, given their common-law tradition of revising and even rejecting old rules that have ceased to fit with the overall "legal topography." Common-law courts already engage in this practice of nullifying obsolete statutes to a certain degree. It would be far preferable to have an open acknowledgment of the practice and its legitimacy. No harm would be done to principles of representative government since the relevant legislative body would have the last word. Courts might engage in a wide range of techniques in the performance of this task, including nullifying a statute, substituting a new one in its place, or simply warning the legislature that judicial action with respect to a given obsolete statute is highly likely.³⁰⁴

Calabresi's thesis is not entirely complete. It is not clear, for example, whether he sees any meaningful distinction between state and federal courts. Nor is it clear that he would require legislative authorization as a precondition to the judiciary's undertaking its new "common-law" responsibility. Nonetheless, the broad outlines of the thesis are clearly visible, and Calabresi's rhapsodic treatment of judicial activism has sparked heated debates within the legal community. Not surprisingly, Judge Richard Neely has hailed it as having "the precedential value of a well reasoned federal circuit court opinion [which] will ultimately have a major effect on the fabric of the law."³⁰⁵ Somewhat more surprisingly, at least one conservative law professor also has expressed support.³⁰⁶ On the other hand,

HARV. L. REV. 534 (1982); Neely, *Obsolete Statutes, Structural Due Process and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271 (1982); Rees, *Cathedrals Without Walls: A View from the Outside*, 61 TEX. L. REV. 347 (1982).

304. See, e.g., G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2, 5-7, 101-09, 120-23, 147-49 (1982).

305. Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 281 (1982). Judge Neely's book, R. NEELY, HOW COURTS GOVERN AMERICA (1981), has sparked considerable controversy in its own right. Compare Hornstein, Book Review, 41 MD. L. REV. 774, 774, 777-78 (1982) (unfavorable) with Flaherty, Book Review, 21 DUQ. L. REV. 835, 841 (1983) (favorable).

306. Rees, *Cathedrals Without Walls: A View from the Outside*, 61 TEX. L. REV. 347, 421-22 (1982). With regard to constitutional adjudication Professor Rees would interpret the instrument so that "states could have anti-abortion laws, prayer would be endemic in the schools, and we might have to get by without the Federal Reserve." *Id.* at 423. Nonetheless, Professor Rees supports the Calabresi thesis in the following terms: "[P]rovided only that the decision the judge believes to be most just in the case before him does not exceed or contradict his authority, for him to render another decision on instrumental or institu-

many reviewers have expressed serious reservations about important features of the thesis put forward, and at least one has rejected it out of hand.³⁰⁷

There is general agreement with Calabresi's starting point: The multiplication of obsolete statutes is a serious problem with which the legal system must deal.³⁰⁸ There is also general agreement that Calabresi has made an important contribution to the growing dialogue over how the system might react to this problem.³⁰⁹ Many of the statements in this vein, however, must be viewed as faint praise indeed, because their authors go on to expose serious flaws in the premises of the thesis as well as potentially disastrous implications of its adoption.

The validity of drawing generalizations for public law from the interplay between courts and statutes in such a traditional field of private law as torts has been called into question.³¹⁰ More fundamental, the question has been raised whether it is conceptually sound to treat statutes and common-law precedents as generically and hierarchically similar, given the extensive hurdles of the legislative process that statutes have to surmount in order to become law.³¹¹ Critics also have questioned the fairness of leaving the initiation of the review process to the haphazard and undemocratic accident of the bringing of a law suit.³¹²

From the perspective of this Article there are three particularly disturbing aspects of the Calabresi book. The first is his almost cavalier dismissal of the possibility of any constitutional objection to the theme he advocates. Calabresi "cannot take a constitutional objection very seriously."³¹³ He clearly believes that any possible problems would be resolved by a direct legislative delegation, and that such action would have little trouble in overcoming what is left of the nondelegation doctrine. What he is proposing, however, includes the repeal of statutes, a distinctly legislative function.³¹⁴ As the legislative veto case, *Immigration & Naturalization Service v. Chadha*, indicates, the Court will not countenance substantial deviations from the article I procedures for making law.³¹⁵ Thus it

tional grounds contravenes what I take to be the most important function of the judicial office." *Id.* at 422 n.345 (emphasis added).

307. See Estreicher, *supra* note 303, at 1128-29; see also Hill, *Calabresi: An Addendum*, 82 COLUM. L. REV. 1779, 1782-84 (1982).

308. E.g., Cox, Book Review, 70 CALIF. L. REV. 1463, 1463-64 (1982); Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 534 (1982); but cf. Estreicher, *supra* note 303, at 1130-33.

309. Cox, Book Review, 70 CALIF. L. REV. 1463, 1474-1475 (1982).

310. *Id.* at 1467.

311. Estreicher, *supra* note 303, at 1135-36.

312. Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1771-72 (1982).

313. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 114 (1982).

314. Estreicher, *supra* note 303, at 1135-37.

315. 103 S. Ct. at 2786-88.

is entirely possible that the power to repeal statutes would fall within that hard core of legislative powers which cannot be delegated.

More important, Calabresi sees no separation of powers problems.³¹⁶ For him the essential inquiry is a functional one: Are courts in the best institutional position to initiate the process of reviewing statutes? Even if one accepts his affirmative answer to this question, there remains a distinct possibility that it "patently confuses articles I and III of the Constitution."³¹⁷ As Chief Justice Burger pointed out in *Chadha*, the separation of powers doctrine does not always permit the easy way out of any particular problem.³¹⁸ Critics of Calabresi have recognized this, noting that "within the American constitutional ideology, the separation-of-powers doctrine is a restraining rather than a facilitating device. The doctrine must work to prevent one branch's taking advantage of the structural infirmity of another."³¹⁹ It is hard not to share Professor Hill's "incredulity" at the lack of constitutional analysis of the preliminary questions.³²⁰ One also might note that Calabresi's discussion of the constitutional problems, such as it is, contains no reference to *Erie*. Given the fact that *Erie* is the fundamental precedential touchstone on the nature and role of the federal courts, and that it also has something to say about federal courts' common-law powers, this omission is, to say the least, troublesome.

A second shortcoming underlying Professor Calabresi's book is his obvious aversion to the legislative process.³²¹ While insisting that his thesis is not a "nostalgic restoration of courts as the primary makers of law,"³²² there is little doubt that Professor Calabresi would like to go in such a direction. The important starting point is his explanation of why society has accepted an expansive judicial role within the area of the common law proper. The justification for this expansive role is not to be found in any delegation of law-making powers from majoritarian bodies, but in the fact that judges, through training and the process of adjudication, are in the best position to ascertain the "legal fabric and the principles that form it," and that furthermore, these principles are good approximations of the popular will.³²³ In other words, courts are not only better than legislatures at making decisions about what the legal fabric requires; they also are about as good at reflecting the popular will.

Finally, one must recognize that judicial activism carried to these

316. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 115 (1982).

317. Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 534 (1982).

318. 103 S. Ct. at 2787-88.

319. Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1766 (1982) (footnote omitted).

320. Hill, *Calabresi: An Addendum*, 82 COLUM. L. REV. 1779, 1781 (1982).

321. E.g., Cox, Book Review, 70 CALIF. L. REV. 1463, 1464 (1982); Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 537-38 (1982).

322. G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163 (1982).

323. *Id.* at 97.

lengths will have serious, and highly detrimental, consequences for legislative bodies as well as the judiciary itself. As Professor Estreicher convincingly demonstrates, any broadly utilized practice of review and nullification quickly would bring about a loss of legislative accountability, given the legislature's willingness to buck the hard choices over to the courts.³²⁴

A concomitant result would be a diminishing of "the legislature's status as the chief policy-making organ of society."³²⁵ At the same time, as courts became more embroiled in essentially political disputes, the pressures for an increased politicization of the judicial process, particularly the selection of judges, would inevitably increase.³²⁶ In turn, many of the attributes of the judicial process that contribute to its superiority in performing its unchallenged functions would be irretrievably lost.

Where does this leave us? Despite the reservations noted here, and articulately expressed by many of the reviewers, the Calabresi book stands as an articulate and highly significant statement in favor of a rather extreme form of judicial activism. Two possible developments seem likely as the principal contending alternatives. On the one hand, because of the audacity of its thesis and the brilliance with which it is articulated, *A Common Law for the Age of Statutes* may become the necessary starting point for future debates about the role of courts, at least in the nonconstitutional realm, and their relationships to legislative bodies. Even some of those who have extremely harsh words for Calabresi predict such a development.³²⁷ Obviously any supporters of the thesis would like to see such a development occur.³²⁸ Were this to happen, the gap between academic thinking about the role of courts and the Supreme Court's evolving views as evident in the field of implied rights of actions would become so wide as to be unbridgeable. Legal scholarship simply would have ceased to perform its essential dialectic function with the sitting judiciary.

On the other hand, a quite different result is more than a hypothetical possibility. It is conceivable that Calabresi's book will be seen as the inevitable consequence of exalting courts over legislative bodies and seeking what Professor Estreicher describes as "short cuts"³²⁹ for the resolution of pressing social problems that the inherently cumbersome legislative process cannot seem to address adequately or rapidly enough. In other words, judicial activism in the Calabresi mold may be seen as an instance in which

324. Estreicher, *supra* note 303, at 1165.

325. *Id.* at 1166.

326. See Cox, Book Review, 70 CALIF. L. REV. 1463, 1473-74 (1982); Estreicher, *supra* note 303, at 1166; Mikva, *The Shifting Sands of Legal Topography*, 96 HARV. L. REV. 534, 542-43 (1982).

327. Cox, Book Review, 70 CALIF. L. REV. 1463, 1463 (1982); Hutchinson & Morgan, *Calabresian Sunset: Statutes in the Shade*, 82 COLUM. L. REV. 1752, 1752 (1982).

328. E.g., Neely, *Obsolete Statutes, Structural Due Process, and the Power of Courts to Demand a Second Legislative Look*, 131 U. PA. L. REV. 271, 281 (1982).

329. Estreicher, *supra* note 303, at 1173.

the cure is worse than the disease, in that any short-term gains are more than offset by long-term weakening of the fundamental institutions in a democratic society. This is what Justice Powell and those who agree with him have been trying to tell us in the context of what has been described here as the new *Erie* doctrine. It may seem a long way from the dizzying heights of Professor Calabresi's new era for common-law courts to the mundane questions of whether to imply a private right of action under a statute regulating trading in commodity futures. Nonetheless, the issues are ultimately the same.

V. CONCLUSION

It is clear that *Erie* is a major precedential foundation for Justices Powell and Rehnquist in their attempt to force a reconsideration of the role of the federal judiciary. A new *Erie* doctrine has emerged as a potent counterforce to judicial activism in the nonconstitutional domain. The doctrine can be seen at work most clearly in Justice Powell's largely successful attack on the practice of implying rights of action from federal statutes. The new *Erie* doctrine's implications, however, extend much further. Apart from its practical ramifications, the vision of the federal judiciary articulated by Justices Powell and Rehnquist is fundamentally at odds with the vanguard of academic thinking. Perhaps the Court and commentators will simply go their separate ways. For those who take the separation of powers doctrine seriously, Justices Powell and Rehnquist have chosen the correct path.